

05-906 JAN 19 2006

No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LEVI MOHNEY, MARY MOHNEY
and TIMOTHY MOHNEY, PETITIONERS

v.

COOPER OF CANADA LIMITED n/k/a BAUER, INC;

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Fred C. Jug, Jr., Esquire
Brandt, Milnes & Rea, P.C.
1109 Grant Building
310 Grant Street
Pittsburgh, PA 15219
412-255-6500

QUESTIONS PRESENTED

1. This product liability case was brought against the manufacturer of a hockey helmet. A young man became a quadriplegic as a result of his head being placed in a position that he sustained a spinal cord injury. The Plaintiff and defense experts assumed different versions of the facts. The defense experts concluded that the young man lowered his head as he was about to crash into the boards surrounding the hockey rink and this placed his spine in a position to be paralyzed. The plaintiff's experts provided equations and analysis which explained how the product design and failure caused the player's head to rotate from a face forward presentation to one which allowed the force of the impact to be distributed to the top of his head and cause his spinal cord injury. The facts of this case frame an issue of whether Rule 702 and Rule 703 of the Federal Rules of Evidence permit the exclusion of expert engineering opinions where the opinions are consistent with the physical facts and the calculations of the expert have gone unrefuted. The first issue raised in this appeal is whether a *Daubert* analysis must be consistent with the physical facts and evidence of record?

2. Has the Court of Appeals rendered a decision which is in conflict with other Circuit Court decisions which stand as valid authority that expert opinions provided by an engineer could properly be based on valid mathematical equations?

3. Whether the intention of the *Daubert* decision, for advocating a more liberal standard for the admission of expert testimony, has been misapplied by the lower courts and resulted in trial judges rigidly applying the *Daubert* factors and ultimately denying litigants their right to have evidentiary weight and

credibility issues resolved by a jury?

4. The manufacturer of the product at issue, a hockey helmet, was found to be the manufacturer of a component part and therefore not liable for the product liability claims. A conflict exists in the Circuits on the issue of whether a manufacturer may be relieved of liability, in a product liability case, on the basis they were found to be the manufacturer of a component part. An issue has been framed in this case whether such analysis should include consideration of whether the manufacturer had knowledge of certain risks which were known to the manufacturer prior to the product being distributed to the public?

5. Whether a manufacturer can avoid liability under a failure to warn theory on the basis the plaintiff failed to read the warning that accompanied the product as the adequacy of a warning is a jury question?

PARTIES TO THIS PROCEEDING

The Petitioners are Levi Mohnney, Mary Mohnney and Timothy Mohnney, in their individual capacities. Levi Mohnney was seventeen (17) years old when he was paralyzed while wearing a hockey helmet manufactured by the Respondent. Mary and Timothy Mohnney are the parents of Levi Mohnney.

The sole remaining Respondent in this case is Cooper of Canada Limited n/k/a Bauer, Inc.

RULE 29.6 STATEMENT

The Respondent manufactured the hockey helmet that Levi Mohnney was wearing on the date he was paralyzed. Respondent, Cooper of Canada Limited, n/k/a Bauer, Inc. is now known as Bauer Nike Hockey, Inc., a subsidiary of Nike, Inc., which is a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION	1
PROVISIONS INVOLVED.....	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
CONCLUSION.....	29
APPENDIX	
Circuit Court Opinion (07/14/05).....	1a
District Court Opinion. (01/23/04).....	28a
Circuit Court Order Denying Rehearing (10/2/05).....	91a
Expert Report of Norman Johanson, February, 2002.....	93a
Expert Report of Dr. Richard Collins, February, 2002	107a
Expert Report of Dr. Richard Collins, July, 2002	123a
Expert Report of Dr. Richard Collins, October, 2002	128a
Plaintiff's Designation of Experts	141a

Photos of Incident 149a

TABLE OF AUTHORITIES

Page

CASES

CARMICHAEL, 526 U.S. 137 (1999)	15
CLAY V. FORD MOTOR CO., 215 F.3D 663 (6TH CIR. 2000)9,11	
CRISLIP V. TCH LIQUIDATING, CO., 52 OHIO ST.3D. 251, 556 N.E. 2D 1177 (1990).....	29
DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579 (1993).....	10, 26
FLECK V. KDI SYLVAN POOLS, INC., 981 F.2D 107 (3RD CIR. 1992)	24
FORD V. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, 62 FED. APP. 6 (1ST CIR. 2003)	15
GENERAL ELECTRIC COMPANY V. JOINER, 522 U.S. 136 (1997)	14
HARRIS V. GENERAL MOTORS CORP., 201 F.3D 800 (6TH CIR. 2000)	15
HOWERTON V. ARAI HELMET, LTD., 597 S.E. 2D 674 (N.C. 2004)	25, 27
MCCONNELL V. COSCO, INC., 238 F.SUPP.2D 970 (S.D. OHIO 2003)	29
MILES V. KOHLI & KALIHAR ASSOC., LTD, 917 F.2D 235 (6TH CIR. 1990).....	23

vii

MILLER V. BIKE ATHLETIC COMPANY, 687 N.E. 2D 735 (1998)	10
MOHNEY V. USA HOCKEY, INC., 5 FED. APP. 450 (6TH CIR. 2001)	4
MOORE V. COOPER CANADA LTD., (ONTARIO SUPREME COURT 1990	5, 20
NEMIR V. MITSUBISHI MOTORS CORP., 381 F.3D 540 (6TH CIR. 2004)	13
NEMIR V. MITSUBISHI MOTORS CORP., 6 FED. APP. 266 (6TH CIR. 2001)	13
QUIET TECHNOLOGIES DC-8, INC. V. HUREL-DUBOIS U.K LTD., 326 F.3D 1333, 1345 (11TH CIR. 2003)	14
SMITH V. BMW NORTH AMERICA, 308 F.3D 913 (8TH CIR. 2002)	14

STATUTES

28 U.S.C. § 1254(1)	1
---------------------	---

RULES

SUPREME COURT RULE 10(A)	9
--------------------------	---

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Sixth Circuit in *Levi Mohnery, et al v. USA Hockey, Inc., et al.* (C.A. No. 04-3227) was filed on July 14, 2005. (App. 1a-27a).

The Memorandum Order of the United States District Court for the Northern District of Ohio, Western Division, is reported at 300 F.Supp.2d 556. (App. 28a-90a).

The Order of the Court of Appeals for the Sixth Circuit, denying the Petitioner's timely filed petition for rehearing *en banc*, was entered on October 21, 2005. (App. 91a-92a).

JURISDICTION

This Petition for a Writ of Certiorari is being timely filed within 90 days of the Order denying the petition for rehearing *en banc*. (App. 91a-92a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

FEDERAL RULE OF EVIDENCE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is

the product of reliable principles and methods, and (3) the witness has applied the principles reliably to the facts of the case.

FEDERAL RULE OF CIVIL PROCEDURE 56(e)

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated.... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits....

FEDERAL RULE OF EVIDENCE 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted....

STATEMENT

On May 21, 1995, seventeen-year-old Levi Mohny was wearing a hockey helmet manufactured by Cooper Canada, Ltd. n/k/a Bauer, Inc. ("Bauer"). Players of Levi Mohny's age were not permitted to take the ice unless a mask was attached to their hockey helmet. The mask was manufactured by another

manufacturer and the sole remaining Respondent in this case is Bauer. The helmet and mask were not compatible and the use of this particular combination did not meet the industry standards established by the American Society for Testing and Materials (the "ASTM Standards"). This product liability case was based on a theory that the hockey helmet caused the spinal cord injury.

Levi Mohney became a quadriplegic after he collided with the boards that surround the hockey rink. Levi Mohney approached the boards with his head up. Young hockey players are taught to keep their heads up to avoid impacts to the top of the head. Keeping the head up prevents loads from being applied to the crown of the head which is important to the prevention of spinal cord injuries. Manufacturers were aware of the importance of avoiding impacts to the top of the head as awareness programs were created after the number of hockey related spinal cord injuries increased dramatically. Levi Mohney's helmet contained no warning concerning the importance of keeping the head up and avoiding impacts to the top of the head.

The collision with the boards was videotaped and the tape was introduced to establish that Levi Mohney struck the boards with his head up. The tape was reviewed frame by frame and the individual images from the tape show Levi Mohney's head at impact and immediately thereafter. (App. 149a-150a). All of the experts agree that a load to the crown area is required to cause the type of injury Levi Mohney sustained. A central issue in this case was whether the hockey helmet caused Levi Mohney's head to rotate to a position that allowed the injury to occur. Bauer's position in this case is simply that the initial impact was made by the crown of Levi Mohney's head. (App. 5a).

The Mohneys argue the helmet caused Levi Mohney's head to rotate from a face first presentation to a position that applied the load to the top of his head. One theory of liability was that the clip holding the mask in place either failed at impact or vibrated loose during play and this resulted in a redistribution of forces causing Levi Mohney's head to rotate downward. Another theory of liability was that Bauer did not warn players that only certain masks were intended to be used with and/or were compatible with Bauer's helmets. The Mohneys initially retained an expert, Daniel Funk, M.D., who produced an affidavit, in June 1998, based on his inspection of the helmet. Dr. Funk found physical evidence of a face first impact. (App. 143a-146a). The district court granted summary judgment in this case in 1999. The product liability claims were remanded by the Sixth Circuit in 2001. *Mohney v. USA Hockey, Inc.*, 5 Fed. App. 450 (6th Cir. 2001). Following remand, the Mohneys retained a mechanical engineer (Norman Johanson) and a bio-mechanical engineer (Dr. Richard Collins) to analyze the injury. (App. 93a-140a).

The images from the video establish that at or just prior to impact Levi Mohney's head is up. The images of the incident are attached to the Appendix. (App. 149a-150a). Levi Mohney is wearing a white shirt and black helmet. His left arm is up in an attempt to brace the impact and the black glove on his left hand is visible to the left of his head. An opposing player wearing a red shirt and white helmet, is on Levi Mohney's back as the impact occurs. At impact, Levi Mohney's head suddenly rotates downward. This rotation is evident from the images of the tape as Levi Mohney's head is suddenly not visible. (App. 150a).